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In The
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, et al.,

Petitioners,

v.

DUKE ENERGY CORPORATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. DUKE COULD HAVE OBTAINED D.C. CIRCUIT REVIEW OF ANY CLAIM THAT EPA HAD TO USE AN HOURLY RATE TEST FOR PSD 2

II. DUKE'S NEW READING OF THE REGULATIONS IS OBVIOUSLY WRONG 9

III. THE ACT DOES NOT REQUIRE USE OF AN HOURLY RATE MEASURE FOR PSD EMISSIONS "INCREASES" 14

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004).....9

Alabama Power v. EPA, 636 F.2d 323 (1979)..... *passim*

Baldwin v. Reese, 541 U.S. 27 (2004) 9

Bragdon v. Abbott, 524 U.S. 624 (1998) 15

Brown v. Gardner, 513 U.S. 115 (1994) 15

General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).....18

Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980) 8

Hawaiian Elec. Co. v. EPA, 723 F.2d 1440 (9th Cir. 1984) 8

Helvering v. Wilshire Oil Co., 308 U.S. 90 (1939).....16

IBP v. Alvarez, 126 S.Ct. 514 (2005).....17

Johnson v. United States, 529 U.S. 694 (2000) 15

Lorillard v. Pons, 43 U.S. 575 (1978) 6, 7, 15

National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979).....16

New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005) ..... *passim*

New York v. EPA, 431.F.3d 301 (D.C. Cir. 2005) 7, 15

New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006) (*"New York II"*) 7, 15

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) 8

Potomac Elec. Power Co. v. EPA, 650 F.2d 509 (4th Cir. 1981) 8

Puerto Rican Cement v. EPA, 889 F.2d 292 (1st Cir. 1989) ..... *passim*

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 18

Steiner v. Mitchell, 350 U.S. 247 (1956) 17

United States v. Calamaro, 354 U.S. 351 (1957) 15

United States v. Cinergy, 458 F.3d 705 (2006) ..... *passim*

Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) 3

Wis. Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990) ..... *passim*

STATUTES

29 U.S.C. 254(a)(1) 17

29 U.S.C. 254(a)(2) 17

Clean Air Act 42 U.S. C. 7401 *et seq.* ..... *passim*

42 U.S.C. 7411(a) 12, 15, 18

42 U.S.C. 7411(a)(4) 18
42 U.S.C. 7411(a)(8) (1977) 16
42 U.S.C. 7419(d) 16
42 U.S.C. 7419(d)(5) (superseded) 16
42 U.S.C. 7475(b) 18
42 U.S.C. 7478(a) 16
42 U.S.C. 7478(b) 16
42 U.S.C. 7479(1) 18, 19
42 U.S.C. 7479(2)(C) 18
42 U.S.C. 7501(4) 18
42 U.S.C. 7502 16
42 U.S.C. 7503(c)(1) 18
42 U.S.C. 7511a(c) 18
42 U.S.C. 7511a(d) 18
42 U.S.C. 7511a(e) 18
42 U.S.C. 7545(g)(3) (1978) 16
42 U.S.C. 7574(b) 19
42 U.S.C. 7607 2
42 U.S.C. 7607(b) ..... *passim*
42 U.S.C. 7607(b)(2) 8
42 U.S.C. 7607(d) 3, 20
42 U.S.C. 7607(d)(1) 19
42 U.S.C. 7607(e) 19
42 U.S.C. 12201(a) 15

REGULATIONS

40 C.F.R. (1987):

Section 51.18(j)(1)(xvii) 4

Section 51.100 ..... *passim*

Section 51.166 12

Section 51.166(b) ..... *passim*

Section 51.166(b)(2) 9

Section 51.166(b)(2)(i) ..... *passim*

Section 51.166(b)(2)(iii) 4

Section 51.166(b)(2)(iii)(*a*) 20

Section 51.166(b)(2)(iii)(*b*)-(*e*) 19

Section 51.166(b)(2)(iii)(*f*) 13, 19

Section 51.166(b)(3) ..... *passim*

Section 51.166(b)(3)(i) 4

Section 51.166(b)(3)(i)(*a*) 11, 14

Section 51.166(b)(3)(i)(*b*) 11

Section 51.166(b)(8) 12

Section 51.166(b)(12) 4

Section 51.166(b)(16)(i) 4

Section 51.166(b)(17) 4

Section 51.166(b)(21) 3, 4, 12

Section 51.166(b)(21)(i) ..... *passim*

Section 51.166(b)(23) 19

Section 51.166(b)(23)(i) 13
Section 51.166(i)(1) 10
Section 51.166(j)(1) 4
Section 52.01(d) ..... *passim*
Section 60.14 9
Section 60.14(b) 4, 15, 17
Section 60.2(h) 15
Section 60.14(e)(4) (1975) 16

LEGISLATIVE MATERIALS

Pub. L. No. 95-95, § 109(f), 91 Stat. 685 (1977) 16
Pub. L. No. 95-95, § 129(a)(1), 91 Stat. 685 (1977) 16
Pub. L. No. 95-95, § 223, 91 Stat. at 764 16

H.R. Rep. No. 95-294 (1977) 16
H.R. Rep. No. 95-297 (1977) 17

ADMINISTRATIVE MATERIALS

38 Fed. Reg. 18986 (July 16, 1973) 13
39 Fed. Reg. 36946 (Oct. 15, 1974) 13, 16
39 Fed. Reg. 42510 (Dec. 5, 1974) 13
41 Fed. Reg. 55524 (Dec. 21, 1976) 15
42 Fed. Reg. 57459 (Nov. 3, 1977) 10, 16
44 Fed. Reg. 51924 (Sept. 5, 1979) 9, 10

45 Fed. Reg. 52676 (Aug. 7, 1980) ..... *passim*
48 Fed. Reg. 38742 (August 23, 1983).....11
57 Fed. Reg. 32314 (July 21, 1992).....7, 14
61 Fed. Reg. 38249 (July 23, 1996).....5
67 Fed. Reg. 80186 (Dec. 31, 2002).....6
70 Fed. Reg. 61081 (Oct. 20, 2005).....6, 19

INTRODUCTION

Making no effort to defend the Fourth Circuit's reasoning, Duke seeks to defend its result by urging that EPA's 1980 PSD regulations "compel the conclusion that a PSD 'major modification' first requires an NSPS 'modification' – a change that causes an increase in a unit's hourly emissions rate." Br. 33. Duke advances this theory both as a purported basis to avoid Section 307(b), and a substantive argument that the agency's reading of its rules is impermissible.

This makes for painful reading: In fact, the 1980 regulations and their preamble make *no mention whatsoever* of the NSPS maximum hourly rate test Duke now asserts to be a prerequisite for every PSD "major modification." Instead, they set forth in considerable detail a PSD applicability test triggered by increases in "actual" emissions measured in "tons per year," regardless of whether the same project would satisfy the NSPS regulatory test. Duke not only "could have" challenged these patent features of the PSD rules, it did: Duke was party to D.C. Circuit proceedings that began with Duke and others (in 1982) importuning EPA to add an hourly-rate increase requirement to the PSD regulations, and ended with the court rejecting Duke's arguments that the Act mandates an hourly rate test for PSD. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). Duke's identical statutory arguments here are "not subject to review" in this "enforcement action," 42 U.S.C. 7607(b). (They are also meritless.)

Duke's merits brief unveils a *deus ex machina* – two "general" regulatory provisions now said to import an hourly rate increase requirement into PSD. See Br. 28 (1980 "rules as promulgated clearly provided that a PSD 'major modification' first requires an NSPS 'modification.'") (citing 40 C.F.R. 51.100, 52.01(d)). As with many 13th-hour arguments, it was for good reason Duke did not cite either provision in its 101-page brief below (or its opposition to certiorari). Neither even arguably "provides" – "clearly" or

otherwise – that an NSPS hourly rate increase is a prerequisite for PSD applicability.

I. DUKE COULD HAVE OBTAINED D.C. CIRCUIT REVIEW OF ANY CLAIM THAT EPA HAD TO USE AN HOURLY RATE TEST FOR PSD

As our opening brief explained, the Fourth Circuit's decision represents a flagrant violation of Section 307(b), the provision allocating judicial authority over CAA rulemakings. Although Duke protests (Br. 29) that this provision does not disable a court in an enforcement proceeding from rejecting EPA's interpretation of a regulation, that is not what happened below: the Fourth Circuit did not *interpret* the regulations, deeming their text "largely irrelevant." Pet. App. 11a n.3. Its decision rested on a *statutory* ruling that vitiated nationally applicable rules. As we explained, the vice of that conclusion (beyond being wrong about the CAA's substance) is not simply that the question was statutory, but that it was a statutory objection that could have been – and was, in fact – presented to the D.C. Circuit. Making no effort to defend the Fourth Circuit's overstep, Duke even denigrates critiques of the court's reasoning as attacks on a "straw man" that does not reflect "Duke's position." Br. 31.

Duke calls EPA's view that the 1980 PSD regulations do not require an increase in hourly rates an "enforcement interpretation" (Br. 25) that Duke "could not have challenged" (Br. 28) in the D.C. Circuit.[1] But a glance at the

[1] It is not true that the United States raised Section 307(b) "[o]nly after the Fourth Circuit signaled in a supplemental briefing order that it was not accepting EPA's position[.]" Duke Br. 26-27. Its opening brief (US CA4 Br. 23) pointed to the D.C. Circuit's "exclusive jurisdiction," and when, at oral argument, the panel questioned the regulations' consonance with the CAA, counsel for the United States observed that "reject[ing] portions of the PSD regulations" was "something only the D.C. Circuit has jurisdiction to do" under "Section 7607" of the CAA. CA4 Arg. Tr. 15. When one judge responded, "[t]his would not be that. This would be statutory – this is Congress telling us that the definition must be the same," counsel explained that "the proper vehicle for making that claim

plain language of the regulations reveals the utter insubstantiality of this plea. The 1980 PSD regulations contain no requirement that there be an increase in a source's hourly rate for PSD to apply. To the contrary, they direct, in specific and technical detail, that emissions be measured in "tons per year" of "actual" emissions, 40 C.F.R. 51.166(b)(3), (21). EPA's adoption of this "actual, annual" emissions increase test in 1980 was "action" "of which review could have been obtained" in the D.C. Circuit. See 42 U.S.C. 7607(b), (d). As the Seventh Circuit recently explained in rejecting a challenge to the 1980 PSD regulations advanced by Duke's affiliate:

> Cinergy's principal argument * * * is that Congress required that the regulation define "modification" as a change in the hourly emission rate. Since the [1980 PSD] regulation does not define it so, this seems an attack on the validity of the regulation rather than an argument about its meaning, and [pursuant to CAA Section 307(b)] issues of validity * * * are beyond the jurisdiction of a regional circuit to resolve.

United States v. Cinergy, 458 F.3d 705, 709 (2006). That it is necessary here, as in *Cinergy*, to look preliminarily at the regulations to see whether a party's claim "could have been obtained" in the D.C. Circuit, is *not*, as Duke seeks to argue (Br. 30-31), reason to ignore Section 307(b) and proceed to the merits of challenges that could have been (and here, were) presented to that court.

Here, Duke could not have been lulled by the regulatory text. A requirement that no project can trigger PSD unless it first triggers the NSPS regulatory test would have been an enormously important feature of the 1980 rules. Yet the comprehensive regulatory text and preamble contain not even

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would be in a challenge to the regulations which supposedly violated that statutory mandate." *Id.* The court ordered supplemental briefing on the statutory issue three months later. See JA 9; Pet. App. 21a.

a "mousehole" for such a brontosaurian proviso. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). The PSD rules provide elaborate and specific instructions on how to determine whether a physical or operational change has caused a PSD-triggering emissions increase. 40 C.F.R. 51.166(b)(3), (21) (1987). See Petr. Br. 10-11. When, in those regulations, EPA intended to reference NSPS standards, it did so in clear terms.[2] The PSD rules make no mention of the detailed regulatory test for NSPS modifications in 40 C.F.R. 60.14(b). Unsurprisingly, the four appellate panels to have examined the 1980 regulations' text, cf. Pet. App. 11a n.3, have readily concluded that the test for PSD applicability – turning on increases in actual, annual emissions – differs "fundamentally" from the NSPS hourly rate test.[3]

The 1980 preamble highlighted that EPA had "change[d]" the PSD applicability standards set out in the 1979 proposed rule, 45 Fed. Reg. 52676, 52680 (Aug. 7, 1980), based on the D.C. Circuit's reading of the statute in *Alabama Power v. EPA*, 636 F.2d 323, 399-400 (1979), and EPA's own scrutiny of the "language of the statutory definition," which embraces "any" physical or operational "change" that "increases the amount of any air pollutant emitted by such source." 45 Fed. Reg. at 52700 (emphasis EPA's). The 1980 PSD rules, in turn, define a "major modification" as a (1) "physical change in or change in

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[2] See, *e.g.*, 40 C.F.R. 51.166(b)(12) (BACT under PSD must comply with "any applicable standard under 40 C.F.R. 60 and 61"); 40 C.F.R. 51.166(b)(16)(i) ("allowable emissions" for PSD must be at least as stringent as "standards as set forth in 40 CFR Parts 60 and 61"); see also *id.* 51.166(b)(17), 51.166(j)(1), 51.18(j)(1)(xvii).

[3] *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 913, 915 (7th Cir. 1990) ("*WEPCo.*") (NSPS and PSD rules measure emissions increases in "fundamentally distinct manner," namely, hourly rates versus actual, annual emissions). See *Cinergy*, 458 F.3d at 708 ("the natural reading of the regulation is that any physical change or change in operating methods that increases annual emissions is covered"); *New York*, 413 F.3d at 18; *Puerto Rican Cement v. EPA*, 889 F.2d 292, 297 (1st Cir. 1989).

method of operation" at a source (2) that "results in a significant net emissions increase," 40 C.F.R. 51.166(b)(2)(i), and define those constituent phrases in actual annual terms, *id.* at (b)(3)(i) (net emissions increase defined as "actual emissions"), (b)(21)(i) ("actual emissions" from unit specified as "rate" in "tons per year").

The 1980 preamble is likewise bereft of any support for Duke's assertion that "a PSD 'major modification' first requires an NSPS 'modification.'" Br. 28 (citing 40 C.F.R. 51.100, 52.01(d), neither of which, as explained below, "provided" anything of the kind). To the contrary, the preamble explains that, once a physical or operational change is identified, "[t]he first step in determining whether a 'net emissions increase' would occur is to determine whether the physical or operational change in question would itself result in an increase in 'actual emissions.'" 45 Fed. Reg. at 52698; see *id.* at 52705 (EPA examples discussed in U.S. Br. 23). The actual emissions "rate," as explained, is expressed in "tons per year." 40 C.F.R. 51.166(b)(21)(i).

In 1982, a group of D.C. Circuit petitioners, including Duke, see Petr. Br. 12-13; U.S. Br. 8, 32-33, entered into a settlement whereby EPA agreed to propose for comment a change in the 1980 regulations' definition of "major modification," removing the references to "actual" emissions "wherever it occurs in paragraph (b)(3)" (the definition of "net emissions increase," now 40 C.F.R. 51.166(b)(3)), and to add *new* regulatory language expressly providing that PSD would not apply absent an increase in hourly emissions rates. See Petr. Br. 13. Settlement Agreement, D.C. Cir. No. 79-1112, Exh. B, Sec. A, ¶ 1 (1982). This change would have made an increase in hourly emissions rates a *sine qua non* for PSD applicability – just what Duke now argues, without colorable textual basis, the 1980 regulations themselves already did. See, *e.g.*, Duke Br. 33.[4]

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[4] See 61 Fed. Reg. 38249, 38269 (July 23, 1996) (proposed language would have "eliminate[d] a source's level of operations as a factor when

Duke actually obtained D.C. Circuit review of the "divergence" between the 1980 PSD regulations from the NSPS regulatory test, and the D.C. Circuit rejected its arguments. See *New York*, 413 F.3d at 20.[5] Attempting to downplay that review, Duke asserts that *New York* "principally involved a challenge to the 2002 rules," and that the D.C. Circuit merely disagreed "that Congress adopted NSPS rules *wholesale* into PSD." Br. 32 (citing 413 F.3d at 19-20) (emphasis added). But the court rejected Duke's challenge to the "1980 *and* 2002 rules," specifically, the claim "that modification must have the same regulatory

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determining whether a proposed change will result in an increase" and to require regulators to "completely disregard[]" post-change utilization). See also 67 Fed. Reg. 80186, 80205 (Dec. 31, 2002); 70 Fed. Reg. 61081, 61098 (Oct. 20, 2005) (referring to settlement test as "NSPS-like"). Duke ignores the settlement's terms, failing even to note (Br. 11) it was a party. Duke does, however, try to explain away – as having "nothing to do with Duke's position here" (Br. 11) – the D.C. Circuit brief filed in February 1981 by General Motors *et al.* (Petr. Br. 12), which complained that, under EPA's 1980 rules, PSD could apply "even though the source's net *capacity* to emit remains constant or declines." Br. Ind. Pet'rs On Actual Emissions 5-6 (No. 79-1112; filed Feb. 12, 1981) ("GM Brief") (emphasis added). Yet Duke's central position is that PSD should only apply where there is an increase in "basic emissions capacity" (Duke Br. 2), or a facility's "design emitting capacity" (Duke Br. Opp'n 4). Seeking to blur the incompatibility between this position and the D.C. Circuit's rulings that PSD turns on increases in "actual" emissions, *e.g.*, *New York*, 413 F.3d at 38-40, Duke unveils an oxymoronic new phrase, "actual emissions capacity." Br. 22, 32 n.13; see also Br. 5 ("actual emissions capabilities"). We have requested leave under Rule 32.3 to lodge the settlement agreement and GM Brief with the Clerk.

[5] Duke's arguments here are eerily similar to those made before the D.C. Circuit. Compare, *e.g.*, Joint Reply Br. Ind. Pet'rs 6 (No. 02-1387; filed Sept. 20, 2004) ("in adopting the NSPS and 1974 PSD meaning and usage of modification into NSR, Congress selectively modified certain of the rules while adopting others (including the well-established definition of 'modification') without change. Such selectivity is strong evidence of Congress's intent to incorporate in the statute those regulatory provisions that it did not specifically change. Cf. *Lorillard v. Pons*, 43 U.S. 575, 582 (1978)") with Duke Br. 44.

meaning for NSR as prevailed for NSPS in 1977." 413 F.3d at 19-20.[6] As the D.C. Circuit itself has explained, *New York* "rejected industry's contention that Congress ratified the [NSPS] regulations on 'modification' in the 1977 amendments * * * * [and] their position that 'modifications' require an increase in maximum emissions rates[.]" *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006) (*New York* II) (citing 413 F.3d at 19-20, 40 and 431 F.3d 801, 802-803 (2005) (Williams, J., conc. den. reh'g. en banc)). No party petitioned for certiorari in *New York*, though the time to file elapsed months after the petition in this case was filed.

Nor can Duke escape from *New York* by pointing to (Br. 32-33) the D.C. Circuit's refusal to address, as unripe, industry's challenge to an "allegedly new interpretation of the 1980 rule contained in the preamble to the 2002 rule," 413 F.3d at 20. See also *id.* at 21 (noting that preamble language "appears to be – as EPA claims – no more than a short-hand reference to the 1980 rule, not a formal interpretation").[7] The

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[6] Duke and other petitioners also urged that the 1980 final rule should be vacated as an impermissible departure from the 1979 proposal, which they read to restrict PSD to changes that increased units' capacity to emit. Joint Br. Ind. Pet'rs 35-37 (D.C. Cir. No. 02-1387; filed May 11, 2004).

[7] Duke's repeated assertions before this Court that EPA's position is an "enforcement interpretation" (e.g., Br. 22, 24, 25, 27, 33, 41, 46) – arising from an "abrupt reversal of position" by EPA occurring "in November 1999" (Br. 16) – are inconsistent with its own D.C. Circuit submissions: "*Beginning in the late 1980s*, EPA, without even acknowledging its contemporaneous interpretation of the 1980 NSR rules, attempted to rewrite the rules by reinterpreting them as having repealed the first step of the emissions increase test—*i.e.*, the requirement that there be NSPS modification activity." Joint Br. Ind. Pet'rs 16 (D.C. Cir. No. 02-1387; filed May 11, 2004) (emphasis added); see *New York*, 413 F.3d at 15 (discussing *WEPCo.*, *Puerto Rican Cement*, and 1992 preamble, 57 Fed. Reg. 32314, 32328 (July 21, 1992)). Similarly, the record reflects that since at least 1990, Duke and the Utility Air Resources Group (of which Duke is a member and with whom it shares counsel) have known that increased hours of operation, or "utilization," could trigger PSD even if hourly rates do not increase. JA 243, 272, 276, 380, 496.

D.C. Circuit did not regard as unripe challenges to *the 1980 regulations themselves* – including their "divergence" (*id.* at 20) from the NSPS hourly rate regulation; it rejected those challenges on the merits, *id.* at 18-20. If there were others the D.C. Circuit did "not resolve" (Duke Br. 32), it was because Duke did not present them, see 413 F.3d at 20. Any CAA or APA-style challenge to the 1980 regulations' patent failure to impose an NSPS-like hourly rate "trigger" for PSD would have been cognizable by petition for review immediately upon promulgation, and is barred in an enforcement action. 42 U.S.C. 7607(b)(2). If "fundamental fairness" (Duke Br. 29) speaks to these circumstances, it calls for enforcement of that limitation, which governs, and protects, the large range of interests affected by CAA rulemakings. See, *e.g.*, Br. of Amici Curiae New Jersey *et al.* 5-20; Br. of Amici Curiae STAPPA *et al.* 15-18; Br. of Former EPA Admin'rs 1-13.[8]

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[8] Duke's narrative of regulator acquiescence rings decidedly hollow. That a letter from Duke claiming its units would be in "extended cold shutdown" with "minimal expenditures" (JA 187), prompted agreement from state environmental officials that PSD did not apply (Duke Br. 18), is meaningless given the projects actually Duke undertook – work more accurately explained to utility regulators from whom Duke sought increased rates. See Petr. Br. 19-20 (quoting Duke's statements of need for "total rehabilitation" of "geriatric" units "too dangerous to operate" and otherwise due to be "retired and scrapped"). Also unavailing are routine field inspection reports (Duke Br. 18): A state inspector explained that PSD "determinations are not made in the field" (JA 363) and require testing and analysis such that "just from the inspection and looking at the boiler, you couldn't say it is subject to PSD or not." JA 347. See also JA 313, 323, 333. Despite the scale of Duke's Plant Modernization Program, it never sought an applicability determination from EPA. Cf. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980); *WEPCo*, 893 F.2d at 913; *Puerto Rican Cement*, 889 F.2d at 297-298; *Potomac Elec. Power Co. v. EPA*, 650 F.2d 509 (4th Cir. 1981); *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440 (9th Cir. 1984). To the extent claims of agency acquiescence or prejudicial delay in initiating enforcement could have any legal relevance here, they would not bear on the validity of the EPA's regulations or interpretation, but on affirmative defenses such as estoppel or laches—defenses Duke asserted below. But see *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419-24 (1990).

II. DUKE'S NEW READING OF THE REGULATIONS IS OBVIOUSLY WRONG

Duke contends "that an NSPS 'modification' is required before a [PSD] 'major modification' analysis can occur," so that PSD cannot apply unless "an increase in a unit's maximum achievable hourly emissions rate occurs." Br. 32 (citing 40 C.F.R. 60.14, the NSPS regulation). Although the PSD regulations' highly specific instructions on how to measure emissions "increases" for PSD purposes say nothing of an hourly rate "trigger," Duke claims it materializes by operation of two "general" regulatory provisions, which are said to make satisfaction of the NSPS hourly rate increase test a prerequisite for any PSD "major modification." See Duke Br. 2, 10, 28, 32, 34 (citing 40 C.F.R. 51.100, 52.01(d)).

Duke did not present this account of the regulations in its briefs in the Fourth Circuit or its opposition to certiorari. In neither place did Duke *cite* either of the regulatory provisions now assigned the monumental role of importing the NSPS hourly rate standard into the PSD regime.[9] To the contrary, its opposition (correctly) referred to "major modification," 40 C.F.R. 51.166(b)(2), as "the definition of 'modification' for PSD." Duke Cert. Opp. 7-8. See *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (waiver under Sup. Ct. Rule 15.2); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004) (same).

This late-breaking regulatory argument is, in any event, completely disconnected from the 1980 PSD regulations, which nowhere incorporate – as the "trigger" (see Duke Br. 32) for a PSD modification, or for any other purpose – the NSPS regulations' hourly rate provisions in Part 60.14. Rather, the definition of "major modification" in 40 C.F.R. 51.166(b) sets forth a free-standing and complete standard for judging whether activity is subject to PSD, and the

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[9] In *Cinergy*, unlike this case, the appellant did argue that a PSD "major modification" must, by operation of 40 C.F.R. 52.01(d), first constitute a NSPS "modification" – this was among the arguments the Seventh Circuit dismissed as "makeweights." *Cinergy*, 458 F.3d at 711. See Duke Br. 19.

regulations carefully define each of the terms used therein. The definition prescribes what a PSD "'[m]ajor modification' *means*," *id.* 51.166(b)(2)(i) (emphasis added); activities that satisfy the criteria therein are subject to PSD, *id.* 51.166(i)(1).

The term "major modification" was introduced in the 1977 PSD regulations to correspond to the PSD regulatory term "major source," and EPA's initial regulations required that emissions increases from a change be large enough independently to reach the statutory thresholds for "major emitting sources." See 42 Fed. Reg. 57459, 57480 (Nov. 3, 1977). After *Alabama Power* disapproved this "regulatory definition of modification," 636 F.2d at 399, EPA retained "major modification" as the PSD implementation of the CAA term "modification" in the revised rules. See, *e.g.*, 45 Fed. Reg. at 52704 (providing examples of "the way in which *the definition of modification works*") (emphasis added); *id.* at 52705 (examples of changes that "qualify as modifications").[10]

The 1980 regulations define "major modification" in high-resolution detail, leaving no room for Duke's subliminal NSPS trigger. According to Duke, before a "major modification" can occur, "first" a "unit's" hourly rate must increase. Br. 33. But the 1980 regulations explicitly define "actual emissions" at the "unit" level in "tons per year," 40 C.F.R. 51.166(b)(21)(i); see 45 Fed. Reg. at 52698 ("the first step" is to "determine whether the physical or operational change in question would itself' increase annual emissions). At the next stage, the regulator must sum "*any increase* in actual emissions from a particular physical change" with "*any other* increases and decreases in actual emissions at the source." 40 C.F.R. 51.166(b)(3)(i)(*a*), (*b*) (emphases added).

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[10] EPA did not use Duke's allegedly NSPS-referring definitional structure for PSD prior to 1980, either. See, *e.g.*, 44 Fed. Reg. 51924, 51948 (Sept. 5, 1979) (proposed regulations, describing "major modification" as "the definition of 'modification' * * * when used in the Act in reference to a major stationary source").

Thus, a change that causes a significant increase in a unit's actual, annual emissions qualifies as a "major modification" even if there is no decrease to be "netted" against it, and even if there is no increase in hourly rates. An NSPS "modification" is nowhere made an interceding "first step" for PSD applicability.[11]

Duke's account is also inconsistent with the 1980 preamble's explanation of *why* the "actual emissions" standard supplanted the "potential emissions rate" test proposed in 1979. Both the *Alabama Power* court, and EPA itself, emphasized the broad *statutory* definition of "modification" – and its interplay with the express statutory requirements for PSD – in concluding that PSD must capture "actual" emissions increases. See 636 F.2d at 400; 45 Fed. Reg. at 52700; see also *id.* at 52718 ("Use of actual emissions for increment consumption is consistent with using an actual emissions baseline for defining a major modification."); *id.* (linking choice of "actual emissions" to effort to "reflect actual air quality" in area).

Against the precision of the 1980 regulations, the two "general" provisions Duke cites as the basis for its argument that the PSD regulations incorporate the NSPS hourly rate test, 40 C.F.R. 51.100 and 52.01(d), do very little. Section 51.100 provides that "[a]s used in this Part, all terms not defined herein will have the meaning given them in the Act." This provision applies only to *undefined* terms, and the specific and detailed "major modification" definition in 51.166(b)(2)(i) *is* the regulatory definition of the statutory

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[11] The January 1981 Reich memorandum (cited in Duke Br. 11-12, 28) makes this very point. Reich explained that the "*first*" step in the PSD inquiry is "to determine if there will be a significant net emissions increase from the modification itself" with the emissions "rates" expressed as tons per year. JA 36. Reich noted that this understanding would be published in the Federal Register (JA 36), and it was: 48 Fed. Reg. 38742, 38746 (Aug. 23, 1983) ("first step" is to sum emissions from change at unit); see *id.* n.14 ("tpy" emissions at all steps, including for units).

term "modification" for PSD purposes – as has been recognized by EPA, *supra*, p. 10; by courts both before and after the 1980 rulemaking, see *Alabama Power*, 636 F.2d at 399; *New York*, 413 F.3d at 20; and (until its merits brief) by Duke itself, see Duke Cert. Opp. 7-8. Ever since the term "major modification" was introduced for PSD in 1977, EPA has invariably treated it as the operative NSR regulatory definition of the statutory term "modification," and there is no sign, anywhere, that EPA understood or intended that detailed regulatory definition to be dramatically qualified by Section 51.100's bare reference to the statute.[12]

Equally unavailing is Duke's reliance on Section 52.01(d), which, uncited in the Fourth Circuit or in Duke's opposition to our petition, now rates a "passim," Duke Br. x. Promulgated for the 1974 administrative PSD program, Section 52.01(d) provides that "the phrases modification or modified source mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant * * * *" Section 52.01(d) applies only to "this part" – Part 52 – and, as Duke has recognized, this case is governed by Part 51, establishing the PSD requirements for state plans. See Duke Cert. Opp. 7 n.15 (state rules "are identical to the federal 1980 PSD rules, 40 C.F.R. § 51.166 (1987)"). The Part 51 regulations instruct that "All state plans shall use *the following definitions* for purposes of this section," and that states may use different definitions only if they are "at least as stringent, in all respects as the corresponding definitions below." 40 C.F.R. 51.166(b)

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[12] Even if it applied, 40 C.F.R. 51.100 would get Duke nowhere. Inserting the CAA 111(a)(4) language into the regulatory definition of "major modification," would still predicate PSD applicability (albeit in oddly prolix fashion) on a "net emission increase," measured in "tons per year" of "actual emissions." See 40 C.F.R. 51.166(b)(3), (b)(21). Nor (obviously) does the inclusive definition of "construction" in the PSD regulations, *id.* 51.166(b)(8) (cited in Duke Br. 23, 33, 35, but *also* not cited below) establish an hourly rate-increase precondition for PSD.

(emphasis added).[13]

In any event, by its terms, Section 52.01(d) does not purport to mandate the use of the NSPS (or any other) "hourly rate" test. An "emission rate" can be measured in hourly, daily, annual, or other terms – and the 1980 regulations explicitly measure emissions "rates" in "tons per year." See 40 C.F.R. 51.166(b)(21)(i); (b)(23)(i); see also 38 Fed. Reg. 18986, 18996 (July 16, 1973) (proposed PSD rules describing "rate" in "*annual* * * * tons" of pollution) (emphasis added).[14] The reference to "rate" in Section 52.01(d) does not vary the specific and detailed methodology for identifying PSD emissions increases set forth in 40 C.F.R. 51.166(b).

Duke also invokes the limited exclusion for "[a]n increase in the hours of operation or in the production rate." 40 C.F.R. 51.166(b)(2)(iii)(*f*). But, as its plain language makes clear, this provision addresses what constitutes a "physical change" or "change in the method of operation," not how emissions from such a change should be measured. See, *e.g.*, Petr. Br. 36-37; 45 Fed. Reg. at 52704; *WEPCo.*, 893 F.2d at 916 n.11; *Puerto Rican Cement*, 889 F.2d at 298; 45 Fed. Reg. at 52698 (under regulations, physical and operational "changes" "do not encompass certain specific types of events"). When such a "change" *is* present – in an extensive plant "modernization," for example – the regulations *require* that "[a]ny increase in

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[13] *Alabama Power* specifically described Section 52.01(d) as having been "superseded," 636 F.2d at 348 n.24, and EPA never referenced it in the 1980 preamble. See 45 Fed. Reg. 52686 (1980 regulations would in time "displace the old" Part 52 regulations "entirely"). It is quite implausible that EPA – crafting new regulations in direct response to *Alabama Power* – would have *silently* assigned this provision an enormously important role in determining PSD coverage.

[14] When EPA first promulgated Section 52.01(d) in 1974, the NSPS regulations did not provide for an hourly rate test. See 39 Fed. Reg. 42,510, 42,513 (Dec. 5, 1974) (explaining in the PSD rule preamble that the Administrator was still evaluating how to define "modification" for NSPS purposes); 39 Fed. Reg. 36946, 36947 (Oct. 15, 1974) (soliciting comment on the unit of measurement for emissions increases under NSPS, and including "year[ly]" increases as an option).

actual emissions from a particular physical change or change in the method of operation" be counted, in "tons per year." 40 C.F.R. 51.166(b)(3)(i)(*a*), (b)(21)(*i*).

Duke pleads that "changes in hours operation, standing alone, are not changes in the 'method of operation,'" so "the 'hours of operation' exclusion must do more." Br. 39-40. But this overlooks the breadth of the *statutory* definition, which could be read to include stand-alone increases in utilization, as EPA as expressly noted in 1980, 45 Fed. Reg. at 52705 ("The increase in hours of operation is a change in the method of operation."). See 57 Fed. Reg. at 32316 (because *statutory* definition could "encompass the most mundane activities," agency has defined "modification" to "include common-sense exclusions from the 'physical or operational change' component of the definition"). The exemption – also part of 1992 and 2002 PSD rules that even Duke does not claim to employ an hourly rate test – confines coverage in an important way, but by its plain terms does not preclude consideration of emissions increases resulting from physical or operational changes.

III. THE ACT DOES NOT REQUIRE USE OF AN HOURLY RATE MEASURE FOR PSD EMISSIONS "INCREASES"

Duke's brief (Br. 42-47) mingles two separate statutory arguments: that Congress ratified some specific pre-existing NSPS or administrative PSD regulations in the 1977 PSD enactment (the argument rejected on its merits in *New York*), or that it commanded that the statutory term "modification" be implemented by identical regulations in both NSPS and PSD (the argument accepted by the Fourth Circuit in this case, but found to have been waived in *New York*). The two arguments, inconsistent with one another (see Pet. App. 18a), are alike in two respects: they are both jurisdictionally improper challenges to the regulations EPA actually adopted, and they are both, in any event, meritless.

The statute does not support Duke's argument (Br. 42-44)

that the 1977 PSD enactment's use of the Section 111(a) statutory definition of "modification" constituted a command that EPA must use a *regulatory* standard from the 1975 NSPS regulation. Nowhere does the 1977 PSD enactment purport to incorporate any prior regulation concerning how to measure emissions increases. See *New York*, 413 F.3d at 18-20; *Cinergy*, 458 F.3d at 710.

The 1975 NSPS regulations contained "different" and "possibly inconsistent" definitions of "modification," only one of which contained the hourly rate standard. *New York*, 413 F.3d at 19 (citing 40 C.F.R. 60.2(h), 60.14(b)); see *id.* at 12 ("[i]n its various permutations, this regulatory framework had not been long in place when" Congress enacted the 1977 legislation). The regulations in place under the 1974 administrative PSD program contained other definitions, lacking any reference to hourly rates, 40 C.F.R. 52.01(d), while the non-attainment NSR program contained yet a different test. See *New York*, 431 F.3d 801, 802 (Williams, J., conc. den. reh'g en banc) (discussing "potential allowable emissions" test at 41 Fed. Reg. 55524, 55528 (Dec. 21, 1976)). There is no evidence Congress was aware of any of these regulatory definitions (none of them judicially reviewed), let alone that it intended to entrench any of them as statutory requirements. See *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (citing *United States v. Calamaro*, 354 U.S. 351, 359 (1957)); *Johnson v. United States*, 529 U.S. 694, 726 (2000) (Scalia, J., dissenting); cf. *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (finding regulatory ratification where Congress not only was aware of but expressly referred to and incorporated regulations) (citing 42 U.S.C. 12201(a)).

Congress, in 1977, *did* adopt *other* pre-existing regulations as statutory requirements. It amended the definition of "modification" in CAA Section 111(a) by adding a new legislative exemption for coal-conversion projects approved under Section 119(d) of the Act, one that tracked a

pre-existing 1975 NSPS regulatory exemption.[15] And "elsewhere" in the amendments, Congress "incorporate[d] regulatory provisions expressly by reference." *New York*, 413 F.3d at 19 (citing Pub. L. No. 95-95, § 129(a)(1), 91 Stat. 685, 745 (1977); 42 U.S.C. § 7502 note); see also Pub. L. No. 95-95, § 223, 91 Stat. at 764 (adding since-superseded CAA § 211(g)(3), 42 U.S.C. 7545(g)(3) (1978), referring to specific EPA regulations concerning fuel additives). When Congress wished to incorporate existing EPA regulations in the 1977 legislation, it knew how to do so.

Section 168 of the Act (cited in Duke Br. 44) provides that pre-1977 PSD regulations "shall remain in effect" "[u]ntil such time as an applicable implementation plan is in effect for any area" that complies with new statutory PSD provisions, and would continue to govern projects commenced between July 1, 1975 and August 7, 1977. 42 U.S.C. 7478(a), (b). It manifestly expresses an intent to phase out the preexisting regulations, not capture them in statutory amber. See *Alabama Power*, 636 F.2d at 363; 42 Fed. Reg. at 57459, 57471 (discussing "comprehensive changes" to regulations required by 1977 statute's "comprehensive new requirements"). There is no evidence that Congress, outside the narrow provisions just discussed, intended for pre-1977 regulations to constrain EPA's rulemaking authority. See *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 485-86 (1979) (citing *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 101 (1939)).[16]

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[15] See Pub. L. No. 95-95, § 109(f), 91 Stat. 685, 703 (1977), codified at 42 U.S.C. 7411(a)(8) (a "conversion to coal," under CAA § 119(d)(5) "shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection."). See 40 C.F.R. 60.14(e)(4) (1975) (NSPS regulation exempting "conversion to coal" under § 119(d)(5)); 39 Fed. Reg. 36946, 36948 (Oct. 15, 1974).

[16] Duke quotes (Br. 46) the House Report for the proposition that "existing sources • • • and their emissions' [*sic*] capacity are 'grandfathered.'" H.R. Rep. No. 95-294, at 144 (1977), but fails to mention that Congress *rejected* the House bill's approach, which premised PSD "baseline

Nor is there any merit to Duke's *other* account of what the Act is supposed to have unambiguously provided – Duke's passing nod (Br. 43) to the Fourth Circuit's *Rowan*-based theory that Congress intended that regulations implementing the term "modification" for NSPS and NSR must be the same. Duke's own commitment to this theory is weak indeed, for it advocates an NSR "modification" test substantially different from the NSPS test. Duke fails to explain why Congress would impose as an unyielding statutory requirement one particular feature of the regulatory test for NSPS modifications – the hourly rate test enunciated at 40 C.F.R. 60.14(b) – while simultaneously allowing large departures with respect to others, including minimum significance thresholds and netting, or why, if the mandate is regulatory sameness, the NSPS test should be preferred over an NSR test that is far more consonant with the statutory text, see *New York*, 413 F.3d at 38-40; 45 Fed. Reg. at 52700.

Contrary to Duke's argument (Br. 43), *IBP v. Alvarez*, 126 S.Ct. 514 (2005), does not make the "presumption of uniform usage irrebut[t]able" here. That decision construed the term "principal activity or activities" as interpreted by *Steiner v. Mitchell*, 350 U.S. 247 (1956), and as employed in two contiguous subsections of the Portal-to-Portal Act, covering worker travel "to and from * * * the principal activity or activities," and activities before and after "*said* principal activity or activities," 29 U.S.C. 254(a)(1), (2) (emphasis added). Because the second reference to "said" activities was "an explicit reference to the use of the identical term" earlier in this statute, the Court found "no plausible argument" for diverging interpretations. 126 S.Ct. at 524-25. Here, rather than simultaneously-enacted statutory subsections sharing a single "said" term, the Court encounters separate statutory programs enacted years apart using a general term with component phrases ("source," "increase,"

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concentration" on "plant capacity in existence." H.R. Rep. No. 95-297 (1977) (§ 160(c)(2)(E)(i)). See *Alabama Power*, 636 F.2d at 380-81.

"amount," "emitted") that must themselves be defined to mesh with the distinct regulatory programs. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997); *Cinergy*, 458 F.3d at 710 (noting that NSPS and NSR definitions were enacted "by different Congresses for different purposes").[17]

Finally, the language of the statutory definition – relegated to a cameo role in Duke's script – is inconsistent with the regulatory approach Duke claims it to command. See *New York*, 413 F.3d at 38-40.[18] Congress did not speak of increases in "rate" let alone "hourly" rate), "designed emitting capacity" (Duke CA4 Br. 8), "fundamental ability to emit pollutants" (Duke Br. 24), or "actual capacity" (Duke Br. 22, 32 n.13, 36). Congress, instead, targeted increases in the "amount" of pollutants "emitted." 42 U.S.C. 7479(2)(C), 7411(a). See *id.* 7475(b), 7479(1) (denominating emissions for the PSD program in "tons per year").

Duke dismisses arguments based on the text and structure of the Act by treating the term "purposes" as an epithet (Br. 47-50). As *Robinson* illustrates, however, no rule of statutory construction prevents a court or an agency from construing a term in light of the role it (and the provision in which it appears) plays in the overall statutory scheme. Moreover, neither our argument nor EPA's longstanding interpretation

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[17] Duke's assertion (Br. 43) that Congress explicitly defined PSD modification as "used" in NSPS is incorrect. The term appears in the PSD provision as follows: "construction when used in connection with any source or facility includes modification," 42 U.S.C. 7479(2)(C). Far from mandating identity, that usage invokes the fundamentally distinct "sources" to which the programs apply. See also Petr. Br. 45-48 (summarizing substantive differences between NSPS and NSR programs). See *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (meaning of same term may vary depending on the "'connection in which the words are used'") (citation omitted).

[18] The 1990 Amendments to the NNSR program, which also employs the Section 111(a)(4) definition, 42 U.S.C. 7501(4), built upon EPA's NSR regulatory definition, using annual pollutant thresholds, *id.* 7511a(c), (d), 7511a(e), and "actual emissions," *id.* 7503(c)(1). Petr. Br. 15-16, 40.

of the statute and regulations privileges the CAA's "remedial purpose" over all others. On the contrary, it *also* serves the different purpose of enabling economic growth: Because the increases in actual emissions that Duke claims must be ignored at the permitting stage indisputably *do* consume available "increment," allowing projects like Duke's to proceed without emissions controls crowds out construction of new, more efficient projects. See, *e.g.*, Petr. Br. 40-41; Br. of States of New York, *et al.* 26-28.

Seeking to rescue arguments unmoored to statutory or regulatory text, Duke and its amici suggest that transplanting the NSPS hourly rate test into PSD is necessary to avoid undue burdens for industry, and request a cropping of NSR in light of later legislative developments (but see, *e.g.*, Br. of Amicus Curiae STAPPA *et al.*, at 8-12). At best, such contentions would be grist for EPA rulemaking procedures, not an enforcement action. See 42 U.S.C. 7607(b), (d)(1), (e).[19] But they also disregard the numerous exemptions built into the Act and rules. The statute exempts sources emitting less than "major" pollution thresholds entirely, *id.* 7479(1), and contains a partial exemption for modifications involving less that 50 tons per year of pollution, *id.* 7574(b). EPA's regulations, in turn, exempt individual projects not only through source-wide netting and de minimis thresholds, but also through exemptions for multiple alternative fuel and repowering projects, *id.* 51.166(b)(2)(iii)(*b*)-(*e*), and stand-alone increases in hours of operation or production rate, *id.* 51.166(b)(2)(iii)(*f*). And, contrary to assertions that stretch beyond hyperbole, the rules exempt routine maintenance, repair, and replacement. *Id.* 51.166(b)(2)(iii)(*a*).[20] See 45

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[19] Petitioners oppose EPA's October 20, 2005 rulemaking proposal, 70 Fed. Reg. 61081. But Duke's efforts to capitalize on that initiative (Br. 21-22) weaken its position in this case, since EPA's notice recognizes that the proposal is a significant departure, requiring changes to regulatory text in effect since 1980, see, *e.g.*, 70 Fed. Reg. at 61088-89.

[20] See, *e.g.*, Br. of Alabama, *et al.* 17 ("nearly *every* physical change made

Fed. Reg. at 52726 ("adequate exemptions have been provided in today's regulations and no further ones are authorized under the Act"). But neither Act nor regulations provide for the exemption Duke seeks here — "perpetual immunity," *Alabama Power*, 636 F.2d at 400, for old sources undergoing renovations that increase the amount of pollution actually emitted by thousands of tons per year.

As Judge Posner explained in *Cinergy*, the rule sought by Duke here, "besides not conforming well to the language of the regulation," would encourage investment choices made only to "elude the permit requirement," "distort the choice between rebuilding an old plant and replacing it with a new one," and open "a loophole that would allow pollution to soar unregulated." 458 F.3d at 709, 711. See Br. of Amici Curiae STAPPA *et al.* 7-16; Br. of States of New York, *et al.* 22-29; Br. of Former Administrators Browner and Train 21-24. It would undermine an entire statutory structure predicated in every particular (see Petr. Br. 39-42) on a realistic accounting of increases in the "amount * * * emitted" by major sources of pollution. Duke's policy arguments are misguided, and provide no basis to ignore the statutory allocation of judicial authority in CAA implementation, 42 U.S.C. 7607(b), (d), (e).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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to *every* component of *every* sub-part unit will trigger application of new NSR/PSD requirements") (emphases original). Duke's massive renovation of "geriatric" units (JA 201), see Pet. Br. at 19-20 & nn.12-14, serves as a real-world corrective. Despite the scope and cost of its projects, below Duke invoked the regulatory exemption for "routine maintenance," an issue that would be taken up on remand. See Pet. App. 7a-8a n.2.

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